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**CONSENSUAL SEARCHES, THE FAIRYTALE THAT
BECAME A NIGHTMARE: *FARGO* LESSONS
CONCERNING POLICE INITIATED ENCOUNTERS**

Robert V. Ward Jr.^{†††}

SCENE FROM *FARGO*¹

Chief Gunderson: "Mr. Londegard, sorry to bother you again. Can I come in?"

Mr. Londegard: "Yeah, no, I'm kind of, I'm kind of busy."

Gunderson: "I understand, I will keep it real short then."

"I am on my way out of town, but I was wondering, do you mind if I sit down? I am carrying a bit of a load here."

Londegard: "No. I...."

Gunderson: "Yeah, it's this vehicle I asked about yesterday. I was just wondering...."

Londegard: "Yeah, like I told you, we haven't had any vehicles go missing."

Gunderson: "Okay! Are you sure? Cause I mean, how do you know?"

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†† Thanks to my colleagues Judith Greenberg at the New England School of Law and Professor Deborah Waire Post, Touro Law Center, for their inspiration. Special thanks to all of the staff at New England School of Law. Research assistance was provided by Dale Marrio Robinson, Nike Michaelides, Monica Modi and library staff members Barry Stearns and Ann Acton. Last, but not least, thanks to the faculty support staff, Patricia Gresham, Pamela Cole, Carol Palmer and Dawn Medford. Special thanks to my devoted wife Eleanor Jaynes.

¹ Scene from *FARGO* (Polygram Films 1996) reprinted with permission from ©Polygram Film Productions.

Gunderson: “Okay! Are you sure? Cause I mean, how do you know?”

“Because see in the crime I am investigating the perpetrators were driving a car with dealer plates and they called someone who works here. So it would be quite a coincidence if they weren’t, you know, connected.”

Londegaard: “Yeah, I see.”

Gunderson: “So, how do you, have you done any kind of inventory recently?”

Londegaard: “The car is not from our lot Ma’am.”

Gunderson: “But, how do you know that for sure? Without doing a....”

Londegaard: “Well, I would know! I am the executive sales manager.”

Gunderson: “Yeah, but I understand.”

Londegaard: “We run a pretty tight ship here.”

Gunderson: “I know, but how do they establish that sir. I mean are the cars counted daily or what kind of a routine here?”

Londegaard: “Ma’am! I answered your question.”

Gunderson: “I’m sorry sir.”

Londegaard: “Ma’am, I answered your question. I answered the darn, I’m cooperating here and there is no um....”

Gunderson: “Sir, you have no call to get snippy with me, I am just doing my job here.”

Londegaard: “I’m, I’m not um, I’m not arguing here, I am cooperating and there’s, we’re doing all we can.”

Gunderson: "Sir, could I talk to Mr. Gasterson. Mr. Londegaard."

Londegaard: "Well heck, if you want to, if you want to play games here I am working with you on this thing here, but. Okay! I'll do a damn lot count."

Gunderson: "Sir, right now."

Londegaard: "Yeah, right now! You're darn tooting. If it is so damn important to ya."

Gunderson: "I am sorry sir."

Londegaard: "Ah, what the Christ."

PART I

INTRODUCTION

Today most courts, in particular the United States Supreme Court, would characterize Mr. Londegaard's visit with Police Chief Gunderson as being a voluntary, consensual encounter.² Because the meeting was voluntary, Mr. Londegaard was not officially detained. Thus, his Fourth Amendment right against unreasonable seizure was not violated.³ In truth, Londegaard was detained against his will. It is clear that he did not feel free to leave. He was walking out the door when Chief Gunderson

² Much has been written in recent years about the significance of naming or labeling an event. During the Los Angeles Riots, which occurred after several police officers were acquitted in the beating of Rodney King, some described the event as a "riot." Others called it an insurrection. See Kimberle Crenshaw and Gary Peller, *Reel Time/Real Justice*, 70 DENV. L. REV. 283 (1993).

³ See *Schneekloth v. Bustamonte*, 412 U.S. 218, 224-49 (1973). The *Bustamonte* Court distinguished between the question of whether a person has acted "voluntarily" and the question of whether there has been a "waiver" of actual right. *Id.*

brought his exit to an abrupt halt.⁴ Officer Gunderson had no legal authority since she was beyond her jurisdiction. She did not confront Londegard with flashing blue lights or a gun. While courts generally take the position that Londegard was not in custody,⁵ a reasonable person under similar conditions would also not believe that he or she could leave.⁶ Londegard's presence at the car dealership at that moment was as voluntary as a tiger caged in a local zoo.

The doctrine of consent currently applied by the Court encourages officers to take advantage of ordinary citizens.⁷ These rules are not sufficiently sensitive to the disparate power relationship that exists between the officer in uniform and members of the public.⁸ Police-initiated encounters, like the one portrayed in *Fargo*, should be presumed to implicate Fourth Amendment interests. Consequently, such meetings ought to be viewed as illegal absent either probable cause or reasonable suspicion. It is time to put to rest the legal fiction that a police-initiated encounter with a member of the public can be voluntary, without affirmative proof that the detainee intended to waive his/her rights. This approach should be followed whether the stop occurs on the street, in an airport, on a bus, in the home or one's place of work.⁹

⁴ CHARLES H. WHITEBREAD AND CHRISTOPHER SLOBOGIN, CRIMINAL PROCEDURE, AN ANALYSIS OF CASES AND CONCEPTS §3.02 at 69, § 11.02 (3d ed. 1993).

⁵ See *U.S. v. Mendenhall*, 446 U.S. 544 (1980); see generally *INS. v. Delgado*, 466 U.S. 210 (1983); *Florida v. Bostick*, 501 U.S. 429 (1991); *Michigan v. Chesternut*, 486 U.S. 567 (1988).

⁶ See *Delgado*, 466 U.S. at 210; See also *United States v. Mendenhall*, 446 U.S. 544 (1981); See WHITEBREAD, *supra* note 4.

⁷ See generally *Bustamonte*, 412 U.S. at 218; Robert Ward, *Consenting to Search and Seizure in Poor and Minority Neighborhoods: No Place for a Reasonable Person*, 36 HOW. L.J. 230 (1993).

⁸ See Ward, *supra* note 7.

⁹ See *Terry v. Ohio*, 392 U.S. 1 (1968); *Florida v. Bostick*, 501 U.S. 429 (1991); *Mendenhall*, 446 U.S. at 544; *Delgado*, 466 U.S. at 210; see generally WHITEBREAD AND SLOBOGIN, *supra* note 4, at §3.02.

A number of commentators have previously raised this point,¹⁰ arguing that the Court ought to scrutinize these so called voluntary meetings.¹¹ Frequently they focus on the elements of race, gender, class or sexual orientation.¹² These scholars argue that given the long history of subordination between members of these groups and the police, greater care ought to be taken before a court concludes that an encounter was voluntary.¹³

This paper does not take issue with that approach. It simply suggests that these commentators have not gone far enough. The beauty of the exchange portrayed in *Fargo* is that Mr. Londegaard does not belong to a subordinate community. The detained suspect, a white male, is being interrogated by an

¹⁰ See Ward, *supra* note 7; see also Tracey Maclin, *Black and Blue Encounters*, 26 VAL. U. L. REV. 243 (1991).

¹¹ See Ward, *supra* note 7.

¹² Tracey Maclin, *Race and the Fourth Amendment*, 51 VAND. L. REV. 333 (1998). For a sample of some of the legal scholarship on this point, see David A. Harris, *Factors for Reasonable Suspicion: When Black and Poor Means Stopped and Frisked*, 69 IND. L.J. 659 (1994) [hereinafter "Harris"]; Sheri Lynn Johnson, *Race and the Decision To Detain a Suspect*, 93 YALE L. REV. 214 (1983); Tracey Maclin, "Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter? 26 VAL. U. L. REV. 243 (1991); Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151 (1994); David O. Markus, *Whren v. United States: A Pretext to Subvert the Fourth Amendment*, 14 HARV. BLACKLETTER J. (forthcoming 1998); William R. O'Shields, *The Exodus of Minorities' Fourth Amendment Rights into Oblivion: Florida v. Bostick and the Merits of Adopting a Per Se Rule Against Random, Suspicionless Bus Searches in the Minority Community*, 77 IOWA L. REV. 1875 (1992); Adina Schwartz, "Just Take Away Their Guns": The Hidden Racism of *Terry v. Ohio*, 23 FORDHAM URB. L.J. 317 (1996); Ward, *supra* note 7, at 239; Randall S. Susskind, Note, *Race, Reasonable Articulate Suspicion, and Seizure*, 31 AM. CRIM. L. REV. 327 (1994). Professor Randall Kennedy has written a powerful book on race and the criminal law. See RANDALL KENNEDY, *RACE, CRIME AND LAW* (1997). A chapter in this book is devoted to the appropriateness of using race as a proxy for criminal suspicion. Professor Kennedy strongly opposes governmental use of race in this context. See *id.* at 162.

¹³ *Id.*; See also Adrian Barrio, *Rethinking Schneckloth v. Bustamonte: Incorporating Obedience Theory into the Supreme Court's Conception of Voluntary Consent*, 1 U. ILL. L. REV. 215, 240-41 (1997).

angelic looking, very pregnant, white officer who, at that moment, lacks any official power. She is authorized to arrest suspects in Fargo, North Dakota, not Minneapolis, Minnesota. Londegard and Gunderson are on the same footing with respect to race. Gunderson is conspicuously female, an ascribed status, whose subordination to men is justified in terms of the biological difference evident in Gunderson's physical condition. Londegard does not ignore Ms. Gunderson or override her objections. Rather, he concedes her right to interrogate him.

In the absence of the usual trappings of oppression, one is forced to examine the unique relationship between a uniformed officer and a citizen.¹⁴ The officer in uniform, even one who is a member of a less powerful group, represents power that is not easily ignored. Mr. Londegard did not voluntarily remain in his office. It was not a consensual meeting.

This article examines the legal doctrines relating to detention, voluntariness and consent in the context of police initiated encounters. It is the author's goal to demonstrate that the judicial interpretation of the Constitution in this area is not well grounded in law or social science.

The Fourth Amendment is profoundly anti-government legislation¹⁵ enacted with the idea of preventing law enforcement officers from detaining a citizen without just cause.¹⁶ The legal tests of probable cause and reasonable suspicion, which are traditionally applicable in Fourth Amendment settings, ought to apply to police initiated encounters, including many of those presently deemed to be voluntary, and thus, non-seizures.¹⁷

¹⁴ *Id.*

¹⁵ Anthony Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349 (1974).

¹⁶ *Terry v. Ohio*, 392 U.S. 1, 22-23 (1968); see *Ward*, *supra* note 7, at 240.

¹⁷ *Florida v. Royer*, 460 U.S. 491 (1983) (holding that defendant who was carrying large travelling bags and buying a ticket for domestic travel could be stopped by police officer and temporarily detained while the police verified whether he was a drug courier. However, police officers exceeded their limit when they detained him in a small room, held his ticket and drivers license and told him that he was not free to go); see also *Reid v. Georgia*, 448 U.S. 438 (1980) (holding defendant could not be stopped on mere suspicion that he preceded someone with whom he appeared to be travelling).

Current justifications for these rules express the belief that citizens have a duty to assist law enforcement officers.¹⁸ This belief may have held true in feudal times, but the history of such an assumption is inconsistent with the adoption of the Fourth Amendment.¹⁹

Londegaard, by all accounts, was a person of privilege.²⁰ If Londegaard was not able to tell the officer to leave him alone, then how is the ordinary citizen stopped on the street likely to respond? This article takes the position that United States Supreme Court's decisions in *Terry v. Ohio*²¹ and *Schneckloth v. Bustamonte*²² and their progeny are wrong. In this article, the author examines the tension between the rules governing forcible detention and consensual searches and seizures. In *Terry*, the Court outlined the conditions that must be proved in order to establish that a person had been seized. In *Bustamonte*, the Court's focus was on the question of consent.

Citizens, like Mr. Londegaard, ought to be advised of their right to walk away from a police initiated encounter. In *Bustamonte*, the Court specifically rejected this approach. However, this article revisits the question and demonstrates that many of the suppositions underlying that decision are false. Since *Bustamonte* was decided, countless numbers of citizens have had their Fourth Amendment rights trampled upon by the police under the guise of consensual searches.²³ In order to minimize the potential that a citizen's rights will be violated, there ought to be a rebuttable presumption that consent obtained during a police instituted encounter is involuntary. Such a

¹⁸ *Id.*

¹⁹ See Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. REV. 925, 933 (1997) (noting that at one time the King owned all property and each citizen had a duty to protect it).

²⁰ See STEPHANIE WILDMAN, *PRIVILEGE REVEALED*, with contributions by Marglynne Armstrong, Adrienne D. Davis and Trina Grillo (1996).

²¹ 392 U.S. 1 (1968).

²² 412 U.S. 218 (1973) (holding that when the person subjected to a search is not in custody and the state attempts to justify the search on the basis of the subject's consent, the state must demonstrate that the consent was voluntarily given).

²³ See Ward, *supra* note 7.

requirement would force courts to carefully scrutinize government assertions that the waiver of Fourth Amendment rights is voluntary. The author suggests that police officers be required to inform the citizen of their right to be left alone, of their right to decline before consent can be obtained. Proof of mere consent should not be enough. The goal ought to be consent that is informed and voluntary.

In examining the questions of detention, voluntariness and consent, this article critiques *Terry*, *Bustamonte* and other consent and detention cases decided by the Supreme Court. As part of my analysis, I will draw upon some writings from the field of contract law, which frequently focus on questions of voluntariness and valid consent.²⁴ The article will also consider data drawn from various relevant sociological studies, specifically, studies and articles focusing on the situations where persons are most vulnerable to abuses by those in positions of authority like police officers. This obviously is a key in determining whether a person has voluntarily relinquished his Fourth Amendment rights.

Finally, the author proposes that concrete warnings be given in police initiated encounters, regardless of where they occur, to ensure that the Fourth Amendment rights of all citizens are adequately protected. If art imitates life, then, perhaps, there are lessons to be learned from the motion picture *Fargo*.

²⁴ AMY H. KASTELY, DEBORAH W. POST AND SHARON HOM, *CONTRACTING LAW* (1996). "Because a basic tenet of contract law is that only voluntarily made promises and agreements ought to be binding, a central focus of contract law is on the nature of choice." *Id.* at 1. "The idea of voluntariness in human relations is in turn, connected to the idea of self-determination, - the 'right to be oneself,' to the idea that people can and should make their own choices about their lives." *Id.* "Our choices are constrained by our sense of duty or obligation to others and the presence or absence of meaningful opportunities in our lives" *Id.* at 2.

PART II

CONSENT AS THE ABSENCE OF COERCION

On June 10, 1968, the United States Supreme Court rendered its opinion in *Terry v. Ohio*.²⁵ The appellant, Terry had been detained [stopped] and searched [frisked] by Officer McFadden on the suspicion that he and two confederates were about to rob a store. At trial, McFadden acknowledged that at the time of the interdiction, he had neither a warrant nor probable cause as required by the Fourth Amendment.²⁶ The government argued that neither was needed since Terry had not been seized or arrested.²⁷ According to the state, since there was no seizure, Terry's Fourth Amendment rights had not been violated.²⁸ The state contended that what had transpired was an investigatory stop and frisk rather than a seizure or search.²⁹

The Supreme Court was not convinced,³⁰ responding that any time a citizen is confronted by the police in such a manner, the reasonable person would not feel free to leave. Thus, the Court reasoned a seizure for purposes of the Fourth Amendment, had occurred.³¹ The Court did, however, relax the level of certainty needed for police intervention, absent a warrant supporting probable cause, to a "reasonable articulable suspicion."³² The lesser standard was justified because the government needs only to investigate crime, but also to prevent it, if possible.³³

²⁵ 392 U.S. 1 (1968).

²⁶ *Id.*

²⁷ *Id.* at 16.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 29.

³³ *Id.*

In subsequent opinions, the Court delineated, in a precise manner, in a precise manner, intentions concerning the standard of whether a reasonable person would feel free to leave. Part of the Court's calculus is a two part test outlined in *Michigan v. Chesternut*.³⁴

In *Chesternut*, the Court set forth two prerequisites for reasonableness. First, there must be a show of authority, like flashing blue lights or presentation of a badge; second, the detainee must submit to that authority.³⁵ As a practical matter, this approach is of little value because it states the obvious. The more crucial piece of the equation is, what did the Court mean when it asked the question—[w]ould a reasonable person feel free to leave?

In *United States v. Mendenhall*³⁶ and *INS v. Delgado*,³⁷ the Court said that the test is objective.³⁸ A court, in determining whether a seizure has occurred should engage in a contextual analysis.³⁹ Matters such as age, education, gender and other attendant circumstances are relevant in the analysis.⁴⁰ A number of writers, including this author, have suggested that the Court's prior decisions on that matter have not been sufficiently sensitive to *real* world police encounters.⁴¹ These writers have asserted that a more subjective approach ought to be adopted if the Court is actually concerned about whether a reasonable person would feel free to leave.⁴² This approach would force a discussion about how fear and intimidation are critical factors in any discussion of this issue.

Many of the critical race theorists have attempted to focus attention on the peculiar adversarial relationship existing between

³⁴ 486 U.S. 567 (1987).

³⁵ *Id.* at 577.

³⁶ 446 U.S. 544 (1981).

³⁷ 466 U.S. 210 (1983).

³⁸ *See Mendenhall*, 446 U.S. at 545; *Delgado*, 466 U.S. at 215.

³⁹ *Mendenhall*, 446 U.S. at 554; *See also Delgado*, 466 U.S. at 219.

⁴⁰ *See Ward*, *supra* note 7, at 255.

⁴¹ *See generally Ward*, *supra* note 7. *See also Maclin, Race*, *supra* note 12.

⁴² *See Ward*, *supra* note 7.

members of minority communities and the police.⁴³ Given the long history of abuse, these people are more apt to relinquish their rights out of fear rather than an act of free will.⁴⁴ A cornerstone of the reasonable person test is the assumption that the police will honor a person's request to be left alone. People who are members of subordinated communities generally have little reason to believe that their assertion of constitutional rights will be honored.⁴⁵ Indeed, the relationship between the citizen and the police is based on fear;⁴⁶ fear which has been learned from a series of negative encounters with the police.⁴⁷ It is fear of the consequences of not cooperating with the police which compels many to abandon constitutional rights.

The substance of the critique by critical race theorists is that in this setting, the Court's objective, reasonable person test, as generally applied, is oblivious to these real life problems of police abuse.⁴⁸ One might even argue that the objective test perpetuates the cycle of police abuse, because offending officers are not judged on how the detainee actually felt, but how a reasonable person would have felt under similar circumstances.

The Court's opinion in *Terry* and other cases, illustrates that not every encounter between a citizen and the police presents a Fourth Amendment problem.⁴⁹ Indeed, some meetings might be voluntary.⁵⁰ Voluntary submission and searches do not require warrants, probable cause or a reasonable articulable suspicion since they do not impinge upon Fourth Amendment interests.⁵¹ If a seizure or search is voluntary, there is no need to inquire as to whether a reasonable person would feel free to leave.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Terry v. Ohio*, 392 U.S. 1, 16 (1968).

⁴⁹ *Id.*

⁵⁰ *Id.* See also *United States v. Mendenhall*, 446 U.S. 544 (1981).

⁵¹ See, e.g., *Terry*, 392 U.S. at 1, *Schneekloth v. Bustamonte*, 412 U.S. 218 (1973); *Mendenhall*, 446 U.S. at 544; *Florida v. Bostick*, 501 U.S. 429 (1991).

When is a search or seizure voluntary? The question was answered largely in the Court's 1973 decision, *Schneckloth v. Bustamonte*.⁵² Before analyzing *Bustamonte*, however, it is important to note how significant the labeling or characterizing of an encounter between a citizen and the police can be in terms of Fourth Amendment protection.⁵³ If Mr. Londegard in *Fargo* had been seized, then Chief Gunderson needed a warrant, probable cause or reasonable suspicion before doing so. Were a court to subsequently find that her conduct violated Londegard's rights, then any evidence derived from that meeting was the fruit of the poisonous tree.⁵⁴ Conversely, if there is no seizure, the Chief is free to pursue any and all leads.

Bustamonte relates to just such a situation since it talks about what, if any, affirmative steps an officer must take to inform a party, teetering on the brink of seizure, that he or she can simply ignore an officer's request to stay and answer questions.⁵⁵ The issues of whether a seizure has occurred, and whether the suspect has consented, are closely intertwined. Where one begins and other ends is not always easily determined. What is clear, however, is that the test for both is lacking.

In *Bustamonte*, a police officer stopped a car at 2:30 a.m. when he observed that the license plate light and a headlight did not work.⁵⁶ Six men were in the car.⁵⁷ The defendant, who was a passenger, indicated to the officer that he was the brother of the owner of the car.⁵⁸ The officer asked if he could search the car, and the accused replied, "Sure, go ahead."⁵⁹ No one was under arrest at the time.⁶⁰ The officer did not advise the suspect that he

⁵² 412 U.S. 218, 224-49 (1973) ("[t]he question whether a consent to search was in fact voluntary . . . is a question of fact to be determined from the totality of the circumstances.").

⁵³ *Id.* at 231-52.

⁵⁴ *Wong Sun v. United States*, 371 U.S. 471 (1963); *Mapp v. Ohio*, 367 U.S. 643 (1961).

⁵⁵ *Bustamonte*, 412 U.S. at 219.

⁵⁶ *Id.* at 220.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

had the right to decline the request to search.⁶¹ When the back seat was removed, the officer recovered three checks that had previously been stolen from a car wash.⁶²

The trial judge denied the defendant's request to suppress, noting that consent is an exception to the requirement of a warrant.⁶³ The question presented was whether the Fourth and Fourteenth Amendments require a showing that not only was a person's consent uncoerced, but that it was given with an understanding that the consent could be freely withheld.⁶⁴ In short, the question was whether the government had a duty to advise a person of their right to refuse before their consent would be deemed voluntary.⁶⁵

The Court held that the government need only demonstrate that the consent was voluntary.⁶⁶ Voluntariness is a question of fact to be determined from the totality of the circumstances.⁶⁷ The suspect's knowledge is only one factor to be taken into account when making this assessment.⁶⁸ According to the Court, voluntary does not mean a "knowing" choice.⁶⁹ It does, however, encompass a decision that is essentially free and unconstrained.⁷⁰ The psychological impact of the attending circumstance on the accused is one consideration.⁷¹ The concept of voluntariness also focuses on whether the consent was the product of duress or coercion, express or implied.⁷² The Court specifically rejected the argument that a person needed to know that they had the right to refuse before consent would be valid.⁷³

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at 223.

⁶⁵ *Id.* at 225.

⁶⁶ *Id.*

⁶⁷ *Id.* at 224.

⁶⁸ *Id.* at 225.

⁶⁹ *Id.* at 226.

⁷⁰ *Id.* at 227.

⁷¹ *Id.* at 229.

⁷² *Id.*

⁷³ *Id.* at 231.

The notice requirement was rejected because it was viewed as being impractical and because Fourth Amendment rights are not analogous to the trial-like rights protected by the Fifth and Sixth Amendments.⁷⁴ In *Bustamonte*, the Court indicates that adverse results might grow out of imposing a warning requirement.⁷⁵ Consent searches frequently lead to information that otherwise would be unavailable.⁷⁶ The Court opined that leads could dry up if suspects were advised that they had the right to decline.

This argument was also made at the time that *Miranda v. Arizona* was decided.⁷⁷ Studies conducted since *Miranda* are not conclusive. Indeed, early studies suggest that there was only a minor decrease in the number of confessions and, more significantly, the conviction rate.⁷⁸ The Fourth Amendment has been construed to require that every search and seizure be reasonable.⁷⁹ The exclusionary rule applies only in those circumstances where the benefits of its use outweigh since the cost to society.⁸⁰ Consent searches are reasonable and the cost to society far outweighs any benefit that might be derived from making consent more difficult to obtain, according to the Court.⁸¹

The problem with the Court's analysis is that the Court is too quick to set aside the individual's rights for the good of society. The Court assumes that Fourth Amendment rights are less important than those protected by the Fifth and Sixth Amendments. Police initiated encounters are inherently coercive. The citizen who is stopped, whether on the street, at their place

⁷⁴ *Id.* at 232.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ MILLER, DAWSON, DIX & PARNAS, *THE POLICE FUNCTION* (from Criminal Justice Administration) (4th ed. 1991).

⁷⁸ *Id.* at 519.

⁷⁹ WHITEBREAD, *supra* note 4, at 16.

⁸⁰ *Stone v. Powell* 428 U.S. 465, 488 (1976) (holding the interest in promoting judicial integrity does not prevent the use of illegally seized evidence in grand jury proceedings).

⁸¹ *Bustamonte*, 412 U.S. at 226 (asserting a person's consent to search and seizure is measured by the totality of the circumstances test including, as relevant factors, age, gender, and educational background).

of work, or at home, is vulnerable. The detainee is at the mercy of the police officer and he or she knows it.

Unfortunately, the Court does not see this encounter as raising serious questions about voluntariness. The Court is comfortable ignoring reality. It assumes that citizens retain a level of control and autonomy in police initiated encounters that is not supported by the experiences of ordinary people. This willful blindness does not exist when the discussion on consent, voluntariness and reasonable belief shifts to other areas of law like contracts or property. In these areas, the law tends to be more sensitive to issues of disparate power and the absence of meaningful choice.⁸²

Even without the baggage of racism and sexism, Mr. Londegard was reluctant to tell Chief Gunderson to get out of his office and leave him alone. Londegard did not believe that he was free to leave. Under the analysis in *Terry* and its progeny, Londegard is free to go about his business, and thus, there has been no seizure under the Fourth Amendment. This analysis ignores what is patently clear, there is a element of coercion present that is replicated in most non-emergency police initiated encounters.

There may have been a time when the police officer could be viewed as your friend—but that time has long passed.⁸³ The one purpose of community policing strategies is to restore that trust.⁸⁴

⁸² See MASS. GEN. LAWS ch. 140D § 10 (a) (1981); see also 15 U.S.C. § 1635 (a)-(b) (1994). As an example when one purchases a home, the buyer has three days to rescind the agreement. The policy underlying this law is the assumption that critical financial decisions should not be made in the heat of battle.

⁸³ See Ward, *supra* note 7; see also WILLIAM CLIFFORD, *POLICING A DEMOCRACY* 5:2 AUSTRALIAN INST. OF CRIMINOLOGY 9-10 (1982).

⁸⁴ COMMUNITY POLICING CONSORTIUM, ABOUT COMMUNITY POLICING 3 (visited Sept. 20, 1998) <<http://www.communitypolicing.org/abt6cp.html>>. (stating that “[g]iven the current climate of distrust in many . . . communities, sheriffs and police chiefs and their officers will need to make a concerted effort to forge bonds and cooperation with community members”); see also U.S. DEPARTMENT OF JUSTICE, OFFICE OF COMMUNITY ORIENTED POLICING SERVICES (COPS), 175 COMMUNITIES TO RECEIVE NEW COPS (visited Sept. 20, 1998) <<http://www.usdoj.gov/cops/073098.htm>> (stating that

Were the trust relationship a given, then large numbers of police departments would not be adopting community policing as the new “mantra” of law enforcement.⁸⁵ Police initiated encounters are inherently coercive since it is a relationship constructed on disparate power.⁸⁶ While there are legal remedies for addressing police abuse, those remedies deter only those officers intent on prosecuting a case.⁸⁷ If the officer on the street does not care about obtaining a conviction, then the citizen is at the mercy of the officer. It is the unique nature of the power relationship, the fear and vulnerability of every citizen, that the Court’s decisions in *Terry* and *Bustamonte* seem to ignore. Police officers by their very nature are persons who instill fear. They cannot successfully operate without the element of fear.

To say that the relationship between the citizen and the police is grounded largely in intimidation and fear is not to say that all or most police are bad.⁸⁸ But police are people with guns and with the power to arrest (even if the case is dismissed later). The purpose is to recognize the nature of the dynamics. The Court should address the issue. It is unlikely that any person feels free to leave, or that any search is voluntary when it results from a police initiated encounter.

If courts are to insure that police initiated encounters are in fact consensual, then safeguards similar to the prophylactic *Miranda* warnings are needed.⁸⁹ Regardless of one’s guilt or innocence,

“[c]ommunity policing is . . . helping to foster greater community confidence and trust in law enforcement.”).

⁸⁵ *Id.*

⁸⁶ See Hector Tobar, *Police Fear, Need Shape Pico-Aliso*, L.A. TIMES, Apr. 28, 1991, at B1.

⁸⁷ See WHITEBREAD, *supra* note 4, § 2.05 (stating there are potential legal and equitable remedies since legal actions include civil rights suits, tort actions, injunctive relief as well as possible criminal prosecutions).

⁸⁸ See *Schneekloth v. Bustamonte*, 412 U.S. 218, 224-49 (1973) (establishing that to determine “[t]he question whether a consent to search was in fact voluntary . . . is a question of fact to be determined from the totality of the circumstances.”).

⁸⁹ *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding “[t]he warning of the right to remain silent must be accompanied by the explanation that anything said can and will be held against the individual in court.”).

there are a number of social and psychological factors that operate in concert and undercut the notion that a police initiated confrontation can be voluntary.⁹⁰ These factors tend to erode an individual's ability to protect their interest when confronted by a police officer. The obedience theory,⁹¹ the social power of the uniform,⁹² and the diminishing expectations of autonomy, because of the influences of pop culture,⁹³ are just some of the theories which argue that voluntariness in a police initiated encounter is not probable. I will attempt to show how each on their own would seem to compel one to act against his/her own best interest. In truth, however, these systems or theories work in tandem, thus placing the citizen at an extreme disadvantage in a police-initiated encounter.

PART III

VOLUNTARINESS EXAMINED IN THE LIGHT OF SOCIAL SCIENCE RESEARCH

Obedience Theory

Adrian Barrio in his article, "*Rethinking Schneckloth v. Bustamonte: Incorporation Obedience Theory Into the Supreme Court's Conception of Voluntary Consent*,"⁹⁴ revisits Stanley Milgram's⁹⁵ experiments in obedience theory and applies those principles to consent searches.

⁹⁰ Barrio, *supra* note 13.

⁹¹ *Id.* at 233.

⁹² Leonard Bickman, *The Social Power of Uniform*, 41 J. APP. SOC. PSYCH. 47 (1974).

⁹³ Laura B. Schnieder, *Warning: Television Violence May Be Harmful to Children; But the Amendment May Foil Congressional Attempts to Legislate Against It*, 49 U. MIAMI L. REV. 477, 482 (1994) (stating "[a]fter years of research, accumulated evidence tends to prove 'a direct causal link between EXPOSURE to television violence and subsequent aggressive behavior of the viewer'").

⁹⁴ Barrio, *supra* note 13.

⁹⁵ *Id.* at 233.

In 1960, Milgram conducted experiments in an attempt to explain the unblinking loyalty of low level Nazi war criminals.⁹⁶ It appears that these individuals understood that their conduct was inappropriate, but they participated in atrocities anyway.⁹⁷ In Milgram's experiment, individuals or testers were instructed to administer electric shocks to any subject who responded incorrectly to a request.⁹⁸ The tester was lead to believe that it was possible to increase the severity of the level of the shock experienced by the subject.⁹⁹ The study found that even though the persons administering the pain disliked or disagreed with the task personally, 65% of them administered the shock to the subject.¹⁰⁰ The key to getting the tester/administrator to perform the task was his/her belief that the orders/instructions came from a legitimate authority.¹⁰¹

The results of this study support the theory that obedience to authority is a deeply ingrained behavior or tendency.¹⁰² Furthermore, legitimate authority can and does influence behavior to the point that it overwhelms a person's fundamental sense of right or wrong.¹⁰³ Since the key here is the perception that the authority is legitimate, then it is important to understand the concept of legitimacy.¹⁰⁴ According to Barrio and Milgram, authority is contextually perceived. Children obey teachers.¹⁰⁵ Moviegoers obey ushers. Civilians obey the officer in uniform.¹⁰⁶ Implicit in this perception of authority is that there may be consequences for ignoring it.

Milgram's study is nearly thirty years old and has been the subject of criticism by a number of respected social

⁹⁶ *Id.*

⁹⁷ *Id.* at 234.

⁹⁸ *Id.* at 234-35.

⁹⁹ *Id.* at 235.

¹⁰⁰ *Id.* at 236.

¹⁰¹ *Id.*

¹⁰² *Id.* at 234.

¹⁰³ *Id.* at 237.

¹⁰⁴ *Id.* at 236.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

psychologists.¹⁰⁷ It has been suggested that other variables may explain the high level of compliance or obedience.¹⁰⁸ Thomas Blass in his work entitled, *"Understanding Behavior in the Milgram Obedience Experiment: The Role of Personality Situations and Their Interactions,"* examined several of these possible variables.¹⁰⁹ Blass sets forth a number of intriguing theories which might explain Milgram's findings.¹¹⁰ He focuses on authoritarian submissive personalities,¹¹¹ interpersonal trust, moral judgment, the high degree of social intelligence and manifest hostility.¹¹² The authoritarian submissive personality is one that is submissive, and has an uncritical attitude toward the idealized moral authorities of the in group.¹¹³ These individuals were more apt to comply with the request to administer the shock.

With the interpersonal trust theory, the individual has every reason to expect that safeguards have been taken to protect the subjects of the Milgram experiment.¹¹⁴ They believe no permanent harm will be caused by their conduct.¹¹⁵ They too appeared willing to comply.¹¹⁶ Those persons who exercised independent moral judgment and high social intelligence were more apt to defy instructions.¹¹⁷ Finally, the subjects falling into the manifest hostility class, had no difficulty complying with the order to shock.¹¹⁸

Taking all of these factors and others into account, none alone seemed to explain away the core finding by Milgram in his study

¹⁰⁷ Thomas Blass, *Understanding Behavior in the Milgram Obedience Experiment: The Role of Personality, Situations, and their Interaction*, 60:3J. OF PERSONALITY AND SOC. PSYCH. 398 (1991).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 399-404.

¹¹¹ *Id.* at 403.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

of obedience.¹¹⁹ Clearly, certain factors make a person more or less predisposed to obey. But, in each category significant numbers of people willingly followed the voice of authority.¹²⁰

In the context of police initiated encounters, this would suggest that the average citizen is inclined to accede to the wishes of an officer, even if it is not in their own best interest, simply because the police officer represents authority. In light of the Milgram and Barrio writings, it seems absurd to suggest that consent obtained in the police initiated encounter, such as the scene depicted in *Fargo*, can be truly voluntary.

Social Power of the Uniform

Social power of the Uniform is another theory that when interwoven with the obedience theory, makes it hard to believe that a citizen has the capacity to act freely in a police-initiated encounter. Leonard Bickman describes, in "*The Social Power of a Uniform*," his attempt to determine if people respond differently to uniformed and non-uniformed authority.¹²¹ His finding, not surprisingly, was that there was a higher rate of compliance with the uniformed figures.¹²² While not specifically focusing on police officers, it is easy to see how Bickman's findings might apply to police initiated encounters. Bickman's particular objective was to examine the relationship between uniforms and social power.¹²³ Bickman's work was drawn, in part, from Collin's and Raven's system, which categorized the basis of social power into six levels. They were:¹²⁴

(1) Reward power rests on the person's belief that the influencing agent has, in his possession, some resource which the individual feels he can obtain by conforming to the agent's request.

¹¹⁹ *Id.* at 407.

¹²⁰ *Id.*

¹²¹ Bickman, *supra* note 91.

¹²² *Id.* at 58.

¹²³ *Id.* at 47-53.

¹²⁴ *Id.* at 48.

(2) Coercive power is based on the agent's ability to punish non-compliance.

(3) Legitimate power is based on internalized values which specify that an agent has a legitimate right to exert influence and that this influence ought to be accepted. Cultural values, acceptance of the social hierarchy, or role prescriptions are often the basis of legitimate power. Obedience and compliance to an experimenter's orders in laboratory situations are probably based on legitimate power.¹²⁵

(4) Referent power is based on the identification with the agent. The agent derives his power from his attractiveness.

(5) Expert power stems from the perception that the agent possesses superior knowledge or ability. Expert power operates only as long as the agent is seen as acting in good faith and within the area of this expertness.

(6) Informational power, added later is based on information communicated by the agent.¹²⁶

The subjects in this experiment were asked to pick up a paper bag, to place a dime in a parking meter, or to stand in a particular spot while waiting for a bus. The power or authority figure making the request was dressed in one of three ways: as a civilian, a milkman, or in what superficially appeared to be a police officer's uniform.¹²⁷ The compliance percentage rate by subjects approached by the civilian and milkman were 14% and 19% respectively. The guard, however, received a significantly higher compliance rate of 38%. Neither the age or gender of the subject seemed to significantly alter these findings.¹²⁸ Rates or percentage of compliance did increase if the subject was coached or further prompted by words or conduct.¹²⁹ An interesting aspect of the experiment was that people who, during pre-screening

¹²⁵ *Id.*

¹²⁶ *Id.* at 49.

¹²⁷ See Bickman, *supra* note 91, at 50-53.

¹²⁸ *Id.*

¹²⁹ *Id.*

indicated how they might respond to authority, did not necessarily act consistently with those earlier comments.

"The predictions people make about their behavior in dealing with authorities cannot be counted on for protecting them from carrying out what they may perceive as not being orders from a legitimate authority."¹³⁰

Given Bickman's findings, it is not surprising that Mr. Londegard would allow himself to be interrogated by an out-of-state police officer even though he was not required to submit to questioning. Since Londegard was involved in the kidnapping of his wife, why did he not simply say, "I'm busy, go away." Both the obedience and social power of the uniform theories point out that absent some kind of preliminary warning, the average citizen will find it nearly impossible to tell an approaching officer that, "I don't want to talk with you now." It defies logic to characterize such meetings as being consensual encounters which may subsequently lead to the voluntary relinquishing or waiving of important constitutional rights.

Pop Culture

Another variable at work in eroding the civilian's ability to walk away from the police officer is the impact of popular culture.¹³¹ In this setting, pop culture means television and the movies.¹³² Social scientists and others for decades have suggested that there is a strong link between violence in society and violence depicted on the screen.¹³³ It is reasonable to infer that

¹³⁰ *Id.* at 57.

¹³¹ See generally Laura W. Brill, *The First Amendment and the Power of Suggestion: Protecting "Negligent" Speakers in Cases of Initiative Harm*, 94 COLUM. L. REV. 984 (1994).

¹³² L.J. Shrum, *Effects of Television Portrayals of Crime and Violence on Viewer's Perceptions of Reality: A Psychological Process Perspective*, 22 LEGAL STUDIES FORUM 259, 266 (1998) (asserting that television viewing does, in fact, affect social judgment).

¹³³ *Id.* at 261.

cultivation theory posits that long term viewing of the systematic distortion of reality provided by television programs will have a predictable effect on viewers.

other social values might be altered by exposure to television and movies.¹³⁴

Often there is discussion about the dumbing down or lowering of expectations when it comes to what is acceptable or unacceptable behavior.¹³⁵ Not more than two decades ago, wearing earrings was viewed as aberrant behavior for men.¹³⁵ Today, it is accepted. There was a time when people could not imagine metal detectors in public schools or airports, but now federal buildings and public libraries have alarms, stores have videotapes, and some employees are forced to submit to drug tests and lie detectors.¹³⁷

Expectations change as to what is an appropriate use of police power.¹³⁸ Television and the movies play a role in the shifting of attitudes.¹³⁹ It does not seem to be a great stretch to hypothesize that the viewer of programs like *NYPD Blue*, *Homicide* and *Law and Order* would feel powerless when confronted by police officers.

Specially, the more people watch television, the more they will "cultivate" the television message and thus be more likely to believe that the real world resembles the world of television.

Id. See also George G. Gerbner, "Living with Television: The Dynamics of Cultivation Process," in PERSPECTIVES ON MEDIA EFFECTS 17-48 (Jennings Bryant and Dolf Zillman eds., 1986) (asserting that the rate of violence on television programs is roughly ten times greater than real world incidence).

¹³⁴ Brill, *supra* note 131, at 984.

¹³⁵ *Id.*

¹³⁶ This is not to imply that there is anything wrong with men wearing earrings. It is merely an example of how fashion and behavior can change.

¹³⁷ See *United States v. Mendenhall*, 446 U.S. 544 (1980) (discussing the detention of a citizen in an airport).

¹³⁸ See Richard W. Stevenson, *An Anti-Gang Movie Opens to Violence*, N.Y. TIMES July 27, 1991, at C13. There have been instances when movie theaters have called for additional security or canceled showings completely because of the fear that viewers might be provoked into violence. The controversies over the films—"The Warriors," "Colors," and "Boyz-n-the-Hood," come to mind.

Id.

¹³⁹ See L.J. Shrum, *supra* note 132, at 261 (linking television and movies together here although studies regarding television are more prominent).

The March 31, 1998 episode of *NYPD Blue* depicted a woman named Nadine being questioned by detectives Bobby Simone and Diane Russell. Nadine was detained on an outstanding traffic warrant. When the questioning drifts to other areas, she states clearly, "I want a lawyer." The detectives do not acknowledge the request and just continue their questioning about Nadine's relationship with a murder suspect.¹⁴⁰

On the April 14, 1998 segment of *NYPD Blue*, the suspect Sam is being interrogated by three detectives, Andy Sipowicz, Bobby Simone and Diane Russell. When Sam gives an answer that seems evasive, Detective Sipowicz slaps him, and the detective demands a better answer. No one objects to the slapping, except the victim. He subsequently goes on to make incriminating statements.¹⁴¹ In neither episode are the detainees warned of their rights.

Some will argue, who cares? Londegaard arranged the kidnapping of his wife. Why should the bad guys get more protection? These folks are only getting what they deserve. The question is, are we prepared to sacrifice our autonomy - the right to be left alone - in order to have more efficient law enforcement?

When the *Miranda* decision was issued, many assumed that confessions would dry up — disappear.¹⁴² It was asserted that fewer crimes would be successfully solved and prosecuted.¹⁴³ Those opposed to issuing a warning in police initiated encounter situations are apt to make the same kinds of arguments. The detained citizen needs to be told that she or he is not required to speak with the officer. However, the same fears expressed when *Miranda* was decided are likely to be invoked. Given these concerns, it is useful to consider the various post-*Miranda* studies to determine if, in fact, the cost of warning outweighs the

¹⁴⁰ *NYPD Blue* (ABC television broadcast, Mar. 31, 1998).

¹⁴¹ *NYPD Blue* (ABC television broadcast, Apr. 14, 1998).

¹⁴² See George C. Thomas III, *Is Miranda A Real World Failure? A Plea for More (and better) Empirical Evidence*, 43 UCLA L. REV. 821 (1996). See also Paul C. Cassell, *Miranda's Social Cost*, 90 NW. U. L. REV. 387 (1996); Richard A. Leo, *The Impact of Miranda Revisited*, 86:3 J. CRIM. L. & CRIMINOLOGY 621 (1996).

¹⁴³ Leo, *supra* note 142, at 622.

benefits. Are more criminals going free? Is public safety being sacrificed because the police are handcuffed?¹⁴⁴

The initial post-*Miranda* studies disputed the assertion that clearance rates dropped precipitously.¹⁴⁵ It is worth noting that fewer confessions do not necessarily result in fewer convictions.¹⁴⁶ For a variety of reasons, early studies may have been flawed. Nevertheless, one study of cases from Washington, D.C. covering the period of 1965-1966 found only a 3% change after *Miranda*.¹⁴⁷ A study from Seaside City, a subdivision of Los Angeles, for the period 1964 through 1968 found approximately a 2% drop in confessions.¹⁴⁸

More recent studies suggest that the cost of *Miranda* may be higher than was earlier believed. It is argued that instead of looking at percentages, we should consider the total number of cases lost. In *United States v. Leon*,¹⁴⁹ the Court noted that percentages mask a large absolute number of felons who are released.¹⁵⁰

Leon dealt with the good faith exception to the exclusionary rule under the Fourth Amendment rather than *Miranda*. Even if true, it does not mean that *Miranda* was a bad idea. The new data is not entirely clear either. In spite of Hollywood's depiction of police work, *Miranda* changed attitudes. If nothing else, arguably, it educated the police and made them less abusive and more sensitive to the rights of suspects. *Miranda* does seem to deter the more outrageous forms of police misconduct.¹⁵¹

¹⁴⁴ *Id.*

¹⁴⁵ Thomas, *supra* note 142, at 822.

¹⁴⁶ Leo, *supra* note 142, at 637.

¹⁴⁷ James W. Witt, *Non Coercive Interrogation and Administration of Criminal Justice*, 64 J. CRIM. L. AND CRIMINOLOGY 320 (Seaside City Study 1973); Richard J. Medalia et al., *Custodial Police Interrogation in Our Nation's Capital: The Attempt to Implement Miranda*, 66 MICH. L. REV. 1347 (1968).

¹⁴⁸ Witt, *supra* note 147.

¹⁴⁹ 468 U.S. 897 (1984).

¹⁵⁰ See Cassell, *supra* note 142, at 483-84 (1996).

¹⁵¹ *Id.* at 473.

When *Miranda* is violated, the suspect's Fifth Amendment right has not, in fact, been abused.¹⁵² This is not true when a citizen is stopped and forced to respond to an officer or suffer the consequences. Here, the Fourth Amendment rights of privacy and autonomy are clearly implicated.¹⁵³ Given the importance of the right, police officers ought to be required to say something before a person submits.

It is reasonable to infer that regular viewers of programs like these would have little reason to believe that a police-initiated encounter could be characterized as consensual. Those with the courage to assert their constitutional rights can expect to be threatened or worse. Without the officer being required to inform the citizen of his/her rights, what will keep the Londegaards of the world from giving away valuable rights? It is ironic that, had the exchange between an officer and a citizen been converted into a commercial transaction — a contract, any by-product of that encounter — would be subjected to scrutiny under the doctrine of unconscionability.¹⁵⁴

¹⁵² *Id.* at 472; *See generally* *Michigan v. Tucker*, 417 U.S. 433 (1974); *Mapp v. Ohio* 367 U.S. 643 (1961).

¹⁵³ *See Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* holds that when police have probable cause or reasonable articulable suspicion, they may stop and search a person on the street for weapons. The *Terry* standard is an objective one: "[w]ould the facts available to the officer at the moment of the seizure or search warrant a man of reasonable caution in the belief that the action taken was appropriate?" *Id.* (quoting *Carroll v. United States*, 267 U.S. 132 (1925)). *See also* *United States v. Mendenhall*, 446 U.S. 544 (1980) (discussing the detention of a citizen in an airport).

¹⁵⁴ *See* U.C.C. § 2-301; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 208 (1977); *Williams v. Walker-Thomas Furniture Co.*, 198 A.2d 914 (D.C. App. 1964) (dealing with the potential unconscionability of a contract between a consumer and a furniture retailer); Commentaries by Deborah Post Waire, THE SQUARE DEAL FURNITURE COMPANY in CONTRACTING LAW, *supra* note 24, at 638-43 and Muriel Morisey Spence, *Teaching Williams v. Walker-Thomas Furniture Co.*, 3 TEMP. POL. AND CIV. RTS. L. REV. 89 (1994); (cautioning about stereotypes concerning race, gender, and class which frequently arise in a discussion of the unequal bargaining power and potential unconscionability of the consumer contracts in the *Walker-Thomas* case).

CONCLUSION

The combined forces of obedience to authority, the power of the uniform and lower expectations of privacy make it imperative that citizens be told from the outset that they do have a choice. If the concept of voluntariness and consent are to have any meaning, then the Court should impose safeguards which will insure that the byproduct of a police initiated encounter indeed is voluntary and consensual.

